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No. 86-6867

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

LESLIE LOWENFIELD,
Petitioner,
v.

C. PAUL PHELPS,
Secretary of the Department of Corrections,
State of Louisiana, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
ARGUMENT	1
I. Coercive Procedures, Which Served No Useful Purpose Other Than to Tip the Scales Toward the Death Penalty, Rendered the Sentencing Hearing Unfair and in Violation of the Eighth Amendment and Due Process	1
II. The Louisiana Statutory Scheme, As Applied to Petitioner, Is Unconstitutional for Failing to Enforce the Eighth Amendment Requirement that the Sentencer Find at Least One Meaningful Statutory Aggravating Circumstance as Part of Its Sentencing Consideration	10
CONCLUSION	14

TABLE OF AUTHORITIES

Cases	Page
Berger v. United States, 62 F.2d 438 (10th Cir. 1932)	3
Booth v. Maryland, 107 S. Ct. 2529 (1987)	6, 9
Brasfield v. United States, 272 U.S. 448 (1926)	*passim*
Caldwell v. Mississippi, 472 U.S. 320 (1985)	8, 12
California v. Brown, 107 S. Ct. 837 (1987)	*passim*
California v. Ramos, 463 U.S. 992 (1983)	13
Clark v. Blackburn, 632 F.2d 531 (5th Cir. 1980)	8
Collins v. Lockhart, 754 F.2d 258 (8th Cir. 1985)	11
Cornell v. Iowa, 628 F.2d 1044 (8th Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981)	5
County Court of Ulster County v. Allen, 442 U.S. 140 (1979)	8
Eddings v. Oklahoma, 455 U.S. 104 (1982)	2
Francis v. Franklin, 471 U.S. 307 (1985)	2
Francis v. Henderson, 425 U.S. 536 (1976)	8
Furman v. Georgia, 408 U.S. 238 (1972)	10
Gideon v. Wainwright, 372 U.S. 335 (1963)	6
Godfrey v. Georgia, 446 U.S. 420 (1980)	10, 12
Gregg v. Georgia, 428 U.S. 153 (1976)	10
Henderson v. Kibbe, 431 U.S. 145 (1977)	2
Jenkins v. United States, 380 U.S. 445 (1965)	2
Jones v. Norvell, 472 F.2d 1185 (6th Cir.) (per curiam), *cert. denied*, 411 U.S. 986 (1973)	2, 8
Jurek v. Texas, 428 U.S. 262 (1976)	13
Lowenfield v. Phelps, 495 So. 2d 1245 (1985)	8
Lowenfield v. Phelps, No. 86-5036 (E.D.La., March 31, 1987)	7
People v. Luther, 53 Mich. App. 648, 219 N.W.2d 812 (Mich. Ct. App. 1974), *aff'd*, 394 Mich. 619, 232 N.W.2d 184 (1975)	7
Potter v. United States, 691 F.2d 1275, 1280 (8th Cir. 1982)	3
Reed v. Ross, 468 U.S. 1 (1984)	8
Rose v. State, 425 So. 2d 521 (Fla. 1982), *cert. denied*, 461 U.S. 909 (1983)	4
Rummel v. Estelle, 445 U.S. 263 (1980)	7
Schneckloth v. Bustamonte, 412 U.S. 218 (1973)	14

TABLE OF AUTHORITIES—Continued

	Page
Spaziano v. Florida, 468 U.S. 447 (1984)	6
State v. Arvie, 505 So. 2d 44 (La. 1987)	7
State v. Hall, 272 N.W.2d 308 (S.D. 1978)	7
State v. Loyd, 489 So. 2d 898 (La. 1986), *cert. denied*, 107 S. Ct. 1984 (1987)	11
State v. Mims, 306 Minn. 159, 235 N.W.2d 381 (1975)	7
State v. Ramseur, 106 N.J. 123, 524 A.2d 188 (1987)	5
State v. Shoemaker, 500 So. 2d 385 (La. 1987)	7
State v. Sonnier, 379 So. 2d 1336 (La. 1979)	7
State v. Thomas, 427 So. 2d 428 (La. 1982)	7
State v. Williams, 480 So. 2d 721 (La. 1985)	12
Thomas v. Blackburn, 623 F.2d 383 (5th Cir. 1980)	8
United States v. Bonam, 772 F.2d 1449 (9th Cir. 1985)	3
United States v. Burke, 700 F.2d 70 (2d Cir.), *cert. denied*, 464 U.S. 816 (1983)	3
United States v. Flannery, 451 F.2d 880 (1st Cir. 1971)	3
United States v. Gordon, 780 F.2d 1165 (5th Cir. 1986)	4
United States v. Kahaner, 317 F.2d 459 (2d Cir.), *cert. denied*, 375 U.S. 835 (1963)	3, 8
United States v. Rengifo, 789 F.2d 975 (1st Cir. 1986)	3
United States v. Rey, 811 F.2d 1453, 1459-60 (11th Cir. 1987), *cert. denied*, No. 86-2060 (Oct. 5, 1987)	3, 4
United States v. Robinson, 560 F.2d 507 (2d Cir. 1977), *cert. denied*, 435 U.S. 905 (1978)	3
United States v. Sae-Chua, 725 F.2d 530 (9th Cir. 1984)	9
United States v. Scott, 547 F.2d 334 (6th Cir. 1977)	3, 9
United States v. Thomas, 449 F.2d 1177 (D.C. Cir. 1971)	4

TABLE OF AUTHORITIES—Continued

	Page
United States v. United States Gypsum Co., 438 U.S. 422 (1978)	*passim*
Wainwright v. Sykes, 433 U.S. 72 (1977)	7
White v. United States, 279 F.2d 740 (4th Cir.), *cert. denied*, 364 U.S. 850 (1960)	8
Zant v. Stephens, 462 U.S. 862 (1983)	10, 11
Statutes	
La. Code Crim. Proc. Ann. art. 905.8 (West 1984 & Supp. 1986)	2
La. Code Crim. Proc. Ann. art. 905 (West 1984 & Supp. 1986)	13
Miscellaneous	
Becker, *The Criminal Case: The Allen Charge*, TRIAL, Oct. 1979, at 47	3
Note, *The Allen Charge: Recurring Problems and Recent Developments*, 47 N.Y.U. L. Rev. 296 (1972) (same)	3

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PETITIONER'S REPLY BRIEF

ARGUMENT

I. Coercive Procedures, Which Served No Useful Purpose Other Than to Tip the Scales Toward the Death Penalty, Rendered the Sentencing Hearing Unfair and in Violation of the Eighth Amendment and Due Process.

The briefs of respondent and the United States as *amicus* are more noteworthy for their failure to respond to key contentions in petitioner's main brief than for their affirmative arguments.

First, those briefs essentially ignore the special standards applicable to death sentence proceedings and this Court's "extraordinary measures to ensure that the prisoner sentenced to be executed is afforded process that will guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice, or mistake." *Eddings* v. *Oklahoma*, 455 U.S. 104, 118 (1982) (O'Connor, J., concurring). Rather, the opposing arguments are framed in light of case law dealing with non-capital guilt proceedings, and what is more, each of the coercive practices challenged here is considered as if it had occurred in isolation rather than, as this Court has required, by assessing the risk of their combined effect in light of "all of the circumstances." *Jenkins* v. *United States*, 380 U.S. 445, 446 (1965); *United States* v. *United States Gypsum Co,*, 438 U.S. 422 (1978); *Jones* v. *Norvell*, 472 F.2d 1185 (6th Cir.) (per curiam), *cert. denied*, 411 U.S. 986 (1973) (jury coercion, including *Allen* charge and polling, required reversal of state court conviction on writ of habeas corpus).[1] A significant underlying factor is La. Code Crim. Proc. Ann. art. 905.8 (West 1984 & Supp. 1986). The opposing briefs omit to mention the three state high court decisions discussed in Pet. Br. at 29, overturning death sentences where an *Allen*-type charge was given unnecessarily in the face of similar statutes.

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[1] Contrary to respondent's view, petitioner is not challenging some isolated element of or omission in a jury instruction, as in *Henderson* v. *Kibbe*, 431 U.S. 145 (1977), and *Francis* v. *Franklin*, 471 U.S. 307 (1985), *cited in* Resp. Br. at 18-21. Rather, as in *United States* v. *United States Gypsum Co.*, 438 U.S. 422 (1978), petitioner challenges a conglomeration of circumstances under which the jury's province was unfairly encroached on; as in *Brasfield* v. *United States*, 272 U.S. 448 (1926), petitioner challenges procedures which have a tendency to be coercive and unfair; and petitioner's claim is also grounded in this Court's holdings that a jury's individualized judgment regarding capital punishment cannot be diverted by impermissible extraneous factors. *California* v. *Brown*, 107 S. Ct. 837, 840 (1987).

The *Allen* instruction urging jurors to reach a unanimous verdict, even in its modified form, has been the subject of debate among the courts and commentators as to whether its inherently coercive effect, particularly when given as a "blasting charge" to deadlocked jurors, is counterbalanced by society's interest in avoiding retrials. *See, e.g., United States* v. *Rey*, 811 F.2d 1453, 1459-60 (11th Cir. 1987), *cert. denied*, No. 86-2060 (Oct. 5, 1987) (despite language alterations designed to moderate coerciveness of *Allen* charge, "[p]ractically, the pressure to change position will fall most heavily on the minority"); *accord* Becker, *The Criminal Case: The Allen Charge*, TRIAL, Oct. 1979 at 47, 52 (urging abandonment of all "blasting" charges, including ABA-approved variant of *Allen*); Note, *The Allen Charge: Recurring Problems and Recent Developments*, 47 N.Y. U. L. Rev. 296, 316 (1972) (same).[2]

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[2] Indeed, many of the cases cited by respondent and by the United States acknowledge that to determine whether the potential coerciveness of the *Allen* charge outweighs its usefulness, the charge must be examined in light of all the circumstances. *See, e.g., United States* v. *Bonam*, 772 F.2d 1449, 1451 (9th Cir. 1985). Some of the cited cases found less coercion where, unlike petitioner's case, the court was unaware of the jury's numerical division. *Bonam*, 772 F.2d at 1451; *United States* v. *Rengifo*, 789 F.2d 975, 985 (1st Cir. 1986). Other cited cases require that an element lacking in the *Allen* charge in petitioner's case be included in the charge. *United States* v. *Flannery*, 451 F.2d 880, 883 (1st Cir. 1971) (burden of proof reminder); *Berger* v. *United States*, 62 F.2d 438, 440 (10th Cir. 1932) (burden of proof, reasonable doubt standard); *Potter* v. *United States*, 691 F.2d 1275, 1280 (8th Cir. 1982) (burden of proof, statement that jury may disregard the charge, statement that court is not trying to influence jury). Finally, several of the cited cases acknowledge, as the opposing briefs do not, the significance of the speedy return of a verdict after the *Allen* charge in assessing its coercive effect. *United States* v. *Burke*, 700 F.2d 70, 80 (2d Cir.), *cert. denied*, 464 U.S. 816 (1983); *United States v. Scott*, 547 F.2d 334, 337 (6th Cir. 1977); *United States v. Kahaner*, 317 F.2d 459, 484 (2d Cir. 1963), *cert. denied*, 375 U.S. 835 (1963); *United States v. Robinson*, 560 F.2d 507, 517-18 (2d Cir. 1977), *cert. denied*, 435 U.S. 905 (1978);

What the opposing briefs fail to acknowledge, however, is that in the context of this sentencing hearing under the Louisiana Code, none of these "compelling societal interests" is present. *See* U.S. Br. at 11. Respondent argues that "[a]fter seven days of trial and deliberations, a declaration of a mistrial was a decision with major consequences," Resp. Br. at 27, and the United States' brief dwells at length on the costs and injustice of retrials. U.S. Br. at 10-17.[3] Yet here, there was no possibility under the Louisiana Code of another sentencing hearing since a less-than-unanimous jury should have resulted automatically in a life sentence without parole. Accordingly, the *Allen* charge, like the polling conducted by the trial judge, "serv[ed] no useful purpose," *Brasfield* v. *United States*, 272 U.S. 448, 450 (1926), and stands nakedly coercive. See *Rose* v. *State*, 425 So. 2d 521 (Fla. 1982), *cert. denied*, 461 U.S. 909 (1983) ("no reason" to give *Allen* charge in light of similar statute).

Moreover, in light of the Louisiana code provision, the reference in the charge to the jury's duty to attempt to reach a unanimous verdict described as "just" carried the impermissible message that the jury's inability to reach a verdict—which should have resulted automatically in a life sentence without parole—was less than "just." (J.A. 56). In the circumstances, the charge created the risk of influencing the jury by "extraneous emotional factors, which, we think, would be far more likely to turn the jury against a capital defendant than for him." *California* v. *Brown*, 107 S. Ct. 837, 840 (1987).

United States v. Gordon, 780 F.2d 1165, 1177 (5th Cir. 1986). *See also United States* v. *United States Gypsum Co.*, 438 U.S. 422, 462 (1978).

[3] There is substantial doubt about this rationale for the *Allen* charge, even where retrial is possible. *See, e.g., United States v. Rey*, 811 F.2d 1453, 1460 (11th Cir. 1987), *cert. denied*, No. 86-2060 (Oct. 5, 1987) (since a hung jury often leads not to retrial but to a plea arrangement or dropping of charges, there is no necessity for judges to use coercive verdict-urging charge); *accord United States* v. *Thomas*, 449 F.2d 1177, 1184 (D.C. Cir. 1971).

The United States' contention that there is no right to a "hung" or "lawless" jury misses the point. U.S. Br. at 14-15. Here there could be no "hung" jury in the sense of requiring a retrial, and petitioner did not seek a hung jury but a sentence preserving his life, as mandated by the State code in the event of a less-than-unanimous jury. *See State* v. *Ramseur*, 106 N.J. 123, 524 A.2d 188, 284-85 (1987). Respondent similarly speaks of the need to have "a reminder" to the jury that the goal of its deliberations was a verdict, Resp. Br. at 32, but that was not the only legitimate goal of the hearing under the Louisiana statute. Moreover, the jurors here had received an *Allen*-type charge at the outset, and then had deliberated for nine hours before announcing their disagreement and "great distress" (J.A. 7, 8, 17), so it cannot be said that they needed a reminder of the need to deliberate rather than "simply taking a vote on the accused's guilt or innocence." U.S. Br. at 13.

Nor do the opposing briefs give sufficient weight to the fact that the "blasting" charge here was delivered after two polls, each of which identified and isolated those jurors who, by opposing further deliberations, favored a conclusion which they knew would result in a life sentence. *See* cases cited in Pet. Br. at 20 (condemning "blasting" charge after polling). While recognizing the case law's emphasis on the need to modify the traditional *Allen* charge to avoid its focus on the minority, the opposing briefs fail to address the fact that when the instruction follows a jury poll, "the impression is inherently conveyed to the jury that the revelation of their division prompted the giving of the subsequent verdict-urging instruction and that it is, therefore, directed toward the minority jurors." *Cornell* v. *Iowa*, 628 F.2d 1044, 1048 n.2 (8th Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981).

Contrary to the position taken in the opposing briefs, the two polls here tended be at least as coercive as that

condemned in *Brasfield*, where the inquiry was into the numerical split as to guilt but not which side the minority favored.[4] Here, in light of the jury's awareness that cessation of deliberations meant a life sentence, those jurors who stated that they favored cessation of deliberations were necessarily indicating that they favored the life sentence which would automatically follow from such cessation. The opposing briefs' speculation (Resp. Br. at 36, U.S. Br. at 28-29) that the jurors' death sentence views were not revealed by the polls is contrary to logic and common sense. Moreover, such speculation flies in the face of Justice Stone's perceptive admonition in *Brasfield* that the precise effect of polling often depends on factors which "cannot properly be known to the trial judge or to the appellate court"; yet "its tendency is coercive" and it "can rarely be resorted to without bringing to bear in some degree, serious although not measurable, an improper influence upon the jury. . . ." 272 U.S. at 450. Importantly here, this Court's capital cases mandate procedures which avoid a "risk" of unreliability. *See, e.g., Booth* v. *Maryland*, 107 S.Ct. 2529, 2533 (1987).

Unlike *Brasfield*, where the trial judge merely asked for the numerical division, the coercive tendency here was magnified by the requirement that the jurors

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[4] In regard to this Court's decision in *Brasfield* v. *United States*, 272 U.S. 448 (1926), which held that the "inquiry itself should be regarded as ground for reversal" because it tends to be "coercive" and to undermine "the fair and impartial conduct of the trial," *id.* at 450, the opposing briefs urge that the holding was not of constitutional dimension. While *Brasfield* involved a federal trial where there was no occasion to reach a constitutional issue, the standard applied is precisely that used by this court to measure due process protection in general as well as the high standard applicable in death sentence procedures. *See, e.g., Gideon* v. *Wainwright*, 372 U.S. 335, 342 (1963) (right to counsel is "fundamental and essential to a fair trial"); *Spaziano* v. *Florida*, 468 U.S. 447, 459 (1984) (Eighth Amendment standards require "measured, consistent application and fairness to the accused").

individually identify themselves and state their positions, on two occasions, in writing, and submit those writings to the trial judge.[5] Plainly, this aspect of the procedure "serv[ed] no useful purpose," *Brasfield* at 450, and increased the pressure on the minority jurors who identified themselves to the judge. Contrary to the argument in the opposing briefs that the judge needed to have such information, Resp. Br. at 27, U.S. Br. at 28, the court could have obtained a sense of whether the jury felt that further deliberations were useful simply by directing the foreman to discuss the matter with the jurors in the privacy of the jury room and generally advise the court without divulging the numerical split or the views of individually-named jurors. *See, e.g., People* v. *Luther*, 53 Mich. App. 648, 219 N.W.2d 812, 814 (Mich. Ct. App. 1974), *aff'd*, 394 Mich. 619, 232 N.W.2d 184 (1975); *State* v. *Mims*, 235 N.W.2d 381, 387 (Minn. 1975); *State* v. *Hall*, 272 N.W.2d 308, 312-13 (S.D. 1978).[6]

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[5] In this highly publicized case involving the death of a Deputy Sheriff, public pressure on the jurors was running high in any event. *See Lowenfeld* v. *Phelps*, No. 86-5036, slip op. at 14-15 (E.D. La., March 31, 1987) (J.A. 66, 80-81).

[6] Respondent does not, and cannot, contend that petitioner's claim in regard to the circumstances which posed an unconstitutional risk of jury coercion is barred by any alleged failure to object at trial. *See Wainwright* v. *Sykes*, 433 U.S. 72 (1977). Petitioner's claim is properly before this court on multiple grounds, each of which is sufficient to preserve that claim: first, because petitioner repeatedly objected to the denial of his motions for mistrial, to terminate the proceedings and to instruct the jury that there was no obligation under the law that they reach a verdict (J.A. 50-51, 52-53, 54-55); second, because the mistrial motions and objections met Louisiana's flexible and informal contemporaneous-objection rule, *State* v. *Shoemaker*, 500 So. 2d 385, 388-89 (La. 1987); third, because the Louisiana Supreme Court "routinely reviews all errors, even those to which no objection was lodged, in capital cases in which the death penalty has been imposed," *State* v. *Arvie*, 505 So. 2d 44, 47 n.2 (La. 1987); *State* v. *Thomas*, 427 So. 2d 428, 433 (La. 1982); *State* v. *Sonnier*, 379 So. 2d 1336, 1370 (La. 1979), and therefore federal habeas review is not barred, *Rummel* v. *Estelle*, 445 U.S.

The argument that the other jurors were not told of the polls' results misses the point; the jurors already knew each other's views from their discussion in the jury room. Resp. Br. at 35-36. The coercion emanated from the trial judge's questions, which carried a message favoring further deliberations essential to impose the death penalty; and from invading the jury's secrecy by requiring individual jurors to disclose their personal views in writings submitted to the judge. *See Jones* v. *Norvell*, 472 F.2d 1185, 1186 (6th Cir.) (per curiam), *cert. denied*, 411 U.S. 986 (1973) (invasion of jury secrecy held to be coercive factor relevant in reversing a state court criminal conviction on writ of habeas corpus; *citing Parker* v. *Gladden*, 385 U.S. 363 (1966) and *Turner* v. *Louisiana*, 379 U.S. 466 (1965)). Finally, while a jury request would not excuse unfair procedures, (*see* Resp. Br. at 40, U.S. Br. at 20), the fact is that the jurors did not request the polls, the opportunity to identify their positions in writing, or the repetition of the *Allen* charge.[7] The fact that the jurors indicated a "great

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263, 267 n.7 (1980), *Reed* v. *Ross*, 468 U.S. 1, 7 n.4 (1984); fourth, because the Louisiana Supreme Court decided the claim strictly on the merits, *Lowenfield* v. *Phelps*, 495 So. 2d 1245, 1259-60 (1985), as did the state district court in petitioner's state habeas proceeding. *County Court of Ulster County* v. *Allen*, 442 U.S. 140, 152-54 (1979); *accord Caldwell* v. *Mississippi*, 472 U.S. 320, 327 (1985); *Francis* v. *Henderson*, 425 U.S. 536, 542 n.5 (1976). *See also Clark* v. *Blackburn*, 632 F.2d 531, 533 n.1 (5th Cir. 1980); *Thomas* v. *Blackburn*, 623 F.2d 383, 386 & n.1 (5th Cir. 1980) (where state court decides the claim on the merits in state habeas proceeding, claim may be reviewed subsequently on federal habeas).

In view of the above, and considering that petitioner challenges the totality of the circumstances, respondent's statement that petitioner's counsel stipulated to "the method for handling juror questions during deliberations" fails to demonstrate that petitioner waived his jury coercion claim. Resp. Br. at 38.

[7] Thus, this case is unlike the cases cited by the United States at 20, where juries specifically requested that the court repeat the *Allen*-type charge. *United States* v. *Kahaner*, 317 F.2d 459, 484 (2d Cir.), *cert. denied*, 375 U.S. 836 (1963); *White* v. *United States*,

unbalance in the voting" and expressed "great distress" should have signaled to the court that their sensitive state required a cautious response, consonant with the Louisiana code provision regarding the effect of non-unanimity, which would not have pressured the minority or carried any implication that a unanimous decision would be a "just" result. (J.A. 46, 56). The jury's "internal pressures and apparent disagreement," *Gypsum*, 438 U.S. at 460, together with the speedy return of a verdict after the *Allen* charge, give "rise to serious questions," *id.* at 462, about the fairness of the proceedings.

Considering all the circumstances, and in light of the heightened need for reliability in capital sentencing, the conduct challenged here posed a "constitutionally unacceptable risk," *Booth* v. *Maryland*, 107 S.Ct. 2529, 2533 (1987), that the integrity of the jury was compromised. The tendency to coerce and improperly influence the jury was particularly serious since it was engaged in the delicate and unique, individualized task of formulating a "reasoned *moral* response" on the issue of life or death, *California* v. *Brown*, 107 S. Ct. at 841 (O'Connor, J., concurring) (emphasis in original). The combination of events here created a clear risk that the identified minority were pushed into agreement with the majority on the

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279 F.2d 740, 750 (4th Cir.), *cert. denied*, 364 U.S. 850 (1960). Furthermore, the fact that the jury sought guidance on two occasions, first when it was in "great distress" due to being "unable to reach a decision at this time," (J.A. 17), and the second time when some jurors failed to understand the poll (*id.*), does not mean the jury was asking to be subjected to the barrage of coercive events which ensued. *See United States* v. *Sae-Chua*, 725 F.2d 530, 531 (9th Cir. 1984) (reversing conviction due to an *Allen* charge and polling administered in response to foreman's note asking whether or not deliberations should continue); *United States* v. *Scott*, 547 F.2d 334, 336 (6th Cir. 1977) (reversing conviction where *Allen* charge was given in response to the jury's note requesting "advice" about "some division of thinking among the jury.")

basis of "extraneous emotional factors" generated by the pressure to reach the unanimity required for the death sentence under the Louisiana Code. *Id.* at 840.

II. The Louisiana Statutory Scheme, As Applied to Petitioner, Is Unconstitutional for Failing to Enforce the Eighth Amendment Requirement that the Sentencer Find at Least One Meaningful Statutory Aggravating Circumstance as Part of Its Sentencing Consideration.

Respondent argues that Louisiana's narrow definition of capital murder is sufficient, in and of itself, to provide a sentencing jury with adequate guidance in order to limit its discretion within constitutional bounds. Resp. Br. at 56. This contention ignores two fundamental and well-established requirements of this Court's death penalty doctrine. First, respondent fails to come to grips with the line of precedent—beginning with *Gregg* v. *Georgia*, 428 U.S. 153 (1976), and extending to *Godfrey* v. *Georgia*, 446 U.S. 420 (1980), and then to *Zant* v. *Stephens*, 462 U.S. 862 (1983), as discussed in our main brief on pages 34-35—requiring that the sentencer find at least one meaningful statutory aggravating sentencing factor as the means to limit and guide sentencer discretion in determining who, among those convicted of murder, deserves to die. That petitioner's jury may have considered mitigating circumstances at the sentencing proceeding, Resp. Br. at 54, does not satisfy this fundamental constitutional requirement. Pet. Br. at 37-38.[8]

The second failing of respondent's argument is that—by relying primarily on the narrowness of the Louisiana statutory definition of first degree murder as a means of purportedly satisfying the Eighth Amendment require-

[8] This Court has never held that a sentencer's consideration of mitigating circumstances alone can satisfy the Eighth Amendment's concerns over unguided sentencer discretion expressed in *Furman* v. *Georgia*, 408 U.S. 238 (1972). Indeed, respondent cannot and does not cite to any such case to support its novel proposition.

ments—respondent essentially concedes that petitioner was deprived of the protection afforded him by the Louisiana statute: a separate sentencing proceeding at which the sentencer must consider a broad range of sentencing factors, including the presence or absence of aggravating sentencing circumstances. *Zant* v. *Stephens*, 462 U.S. 862, 876 (1982).[9] Under the sentencing procedures specified in the Louisiana code, petitioner's jury was not informed at the guilt stage of the statutory consequences of its decision and was not then engaged in a "chaneled sentencing proceeding" in which it was distinguishing "a murder case in which the death penalty may be imposed from those cases in which such a penalty may not be imposed." *Zant* v. *Stephens*, 462 U.S. at 883, 886. Nor was the jury at that stage engaged in rendering

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[9] Respondent argues that "[t]here is no mandate in Louisiana's scheme that the jury must weigh the mitigating against the aggravating circumstances." Resp. Br. at 55. That contention is pertinent only where the issue is—as in *Collins* v. *Lockhart*, 754 F.2d 258 (8th Cir. 1985), but not here—whether invalid aggravating circumstances were weighed even though the jury found at least one valid aggravating circumstance. Here, where the sole valid aggravating circumstance was one which had already been found in the determination of whether petitioner was guilty of first degree murder, the requirement in the Louisiana code to find at least one aggravating circumstance at the sentencing hearing became meaningless and failed to fulfill the function of rationally narrowing the category of persons convicted of murder who are eligible for the death penalty. *Zant v. Stephens*, 462 U.S. 862, 877 (1983) ("[A]n aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe penalty on the defendant compared to others found guilty of murder."). It should be noted that a recent decision of the Louisiana Supreme Court stated that "a considerable amount of 'weighing' [of aggravating and mitigating factors] must be engaged in by the jury," *State* v. *Loyd*, 489 So. 2d 898, 905 (La. 1986), *cert. denied*, 107 S. Ct. 1984 (1987). Even under this interpretation of Louisiana law, any guidance provided the sentencer by this "weighing" function of the sentencing hearing, as well as by its narrowing function, was rendered meaningless in the absence of a *de novo* finding of at least one aggravating circumstance, as mandated by the Louisiana code.

the "individualized assessment of the appropriateness of the death penalty" essential to capital sentencing under the Eighth Amendment. *California* v. *Brown*, 107 S.Ct. 837, 841 (1987) (O'Connor, J., concurring). At the sentencing phase, the jury was not required to confront sentencing questions afresh. As permitted under the Louisiana Code, the jury was told by the prosecutor that it need only find the very element it had already found as part of its guilt determination. (J.A. 38).[10] Accordingly, the jury did not engage in the individualized and subjective moral inquiry demanded by the Eighth Amendment. *See, e.g., Caldwell* v. *Mississippi*, 472 U.S. 320, 329-30 (1985).

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[10] While *amicus* State of Arkansas proffers the additional novel explanation of how the aggravating circumstance may be narrower than the definition of capital murder under which petitioner was convicted, the record does not support such a distinction. The State of Louisiana itself concedes that "Lowenfield's capital conviction was based on a single aggravating circumstance which was found at the definitional stage. Thereafter, he was sentenced to death based on the same sole aggravating circumstance. . . ." (Resp. Br. at 64). Respondent's concession is consistent with the jury's understanding of the identity of the statutory aggravating circumstance and the element of the crime of which it had convicted petitioner; the jury was explicitly told by the prosecutor that, to sentence petitioner to death, it need only find the very element it had just determined to exist as part of the guilty verdict. (J.A. 38). *Cf. California* v. *Brown*, 107 S. Ct. 837, 842 (1987) (O'Connor, J., concurring) (referring to importance of assessing effect of prosecutor's statements on jury's understanding of its responsibilities); *Godfrey* v. *Georgia*, 446 U.S. 420, 432 (1980) (same). Furthermore, Arkansas' argument is rebutted by the Louisiana Supreme Court's opinion in *State* v. *Williams*, 480 So. 2d 721, 726-27 (La. 1985), holding that Louisiana's first degree murder statute and the aggravating circumstance found here should be "construe[d] in a parallel fashion" because they "reflect the same legislative intent . . . " Since the requirements of the two provisions, as interpreted by the Louisiana Supreme Court, are identical, the aggravating circumstance found here could not have served the constitutionally-mandated narrowing function.

Rspondent's claim that the concerns expressed in *Furman* have been met is premised solely on its contentionthat the Louisiana sentencing scheme is identical to the Texas sentencing scheme approved by the Court in *Jurek* v. *Texas*, 428 U.S. 262 (1976).[11] This contention, amply refuted in our main brief at pages 39 through 44, cannot withstand careful scrutiny. *Jurek* neither considered nor contemplated a statute which permits a death sentnce to be imposed without a finding of any aggravating elements beyond those contained in the capital crime itself. The significant additional statutory questions which a Texas jury must confront to sentence a defendant to death provide it with the clear guidance in exercising its sentencing discretion that petitioner's Louisianajury lacked, and offer a basis for distinguishing who deserves to die among those convicted of capital murder. See cases cited in Pet. Br. at 12. *See also California* v. *Ramos*, 463 U.S. 992, 1008 (1983) (referring to one of the special questions under the Texas statute as providing "the aggravating factor . . . in the Texas scheme."). Even were one to accept on its face the *Jurek* plurality's *dict*[12] that the narrow definitions of capital murder

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[11]Respondent tries to squeeze the procedure applied to petitioner within the dictates of the Eighth Amendment by distorting the Louiana statute. Respondent's claim that "Louisiana's capital sentncing scheme is basically similar to Texas' because the aggravatig circumstances are found at the definitional stage [of the crim]," Resp. Br. at 55-56, is at sharp variance with the Louisiana statte, La. Code Crim. Proc. Ann. art. 905 (West 1984 & Supp. 198), which provides for a bifurcated guilt and penalty determinatn where the aggravating circumstances must be found only at the earing in the sentencing phase.

[12]By relying on arguably favorable *dicta* in an otherwise inapposite case—and by disregarding this Court's subsequent interpretatin of that language as also requiring the finding of at least one meaingful statutory aggravating circumstance as part of the sentncing consideration (*see* cases cited in Pet. Br. at 43)—respondent would have the Court improperly engage in the so-called

may serve much the same purpose as aggravating sentencing circumstances, 428 U.S. at 270, that statement is wholly irrelevant to the situation in Louisiana, where the statute requires that the appropriate sentence be determined in a separate proceeding. Accordingly, there is no basis for concluding that this Court has already reached the question presented in this case, or that Louisiana's purportedly narrow definition of capital murder can or did provide sufficient sentencer guidance to satisfy the Eighth Amendment's rigorous requirements.

CONCLUSION

For the reasons set forth above, petitioner's sentence of death must be vacated and the decision below of the United States Court of Appeals for the Fifth Circuit must be reversed.

Respectfully submitted,

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" 'domino method of constitutional adjudication . . . wherein every explanatory statement in a previous opinion is made the basis for extension to a wholly different situation.' " *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 246 (1973).